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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 65

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS T. MERZ ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 471) is reported at 306 F. 2d 39.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1962. (R. 479). A timely petition for rehearing *en banc* was denied on September 6, 1962 (R. 479, 480). On December 3, 1962, Mr. Justice White extended the time to file a petition for a writ of certiorari to February 4, 1963 (R. 480). The petition was filed on February 4, 1963, and granted on April

22, 1963 (R. 481). 372 U.S. 974.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an eminent domain proceeding, a district court may adopt the reports of a commission it has appointed pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure to determine the issue of just compensation, if the reports state only the ultimate awards made by the commission and fail to show what evidence was considered by the commission, what law was applied, and what was the basis of the ultimate awards.

RULES INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (e) Report.
>
> * * * * * *
>
> (2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive

[1] At the same time, certiorari was granted in a companion case, *United States* v. *2,872.88 Acres in Clay and Quitman Counties*, 310 F. 2d 775 (C.A. 5), 372 U.S. 975.

further evidence or may recommit it with instructions.

Rule 71A of the Federal Rules of Civil Procedure provides, in pertinent part:

> (h) Trial.
>
> If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

In March 1956 the United States instituted condemnation proceedings to obtain clearance easements[1] over twelve tracts of farmland for military and other purposes in connection with the Clinton-Sherman Air Force Base in Oklahoma (R. 2). In March 1957 the complaint was amended so as to obtain clearance easements over two additional tracts and the fee interest in another two tracts (R. 23). The clearance easements were sloping and their elevation over the various farms ranged from 13 feet to 164 feet.

The parties stipulated regarding the compensation to be paid for the interests taken on six of the tracts. With respect to the remaining ten tracts, the district court, upon the landowners' motion and over the government's objection, ordered the issue to be tried before a commission pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure (R. 9, 26, 33, 37).

At the commission's hearing, the parties stipulated that the highest and best use of the land was for general agricultural purposes. The extent to which this purpose was affected by the clearance easements was disputed among the landowners' and the government's witnesses. In addition, the landowners claimed that their property had certain mineral value which was affected by the easements. The degree to which the

[1] Unlike avigation easements, clearance easements do not involve flights. Clearance easements place a ceiling over land above which obstructions may not extend. See *United States* v. *Brondum*, 272 F. 2d 642, 643–647 (C.A. 5). Some of the landowners in the present case have also filed suit in the Court of Claims seeking damages for the alleged taking of avigation easements. *Davis* v. *United States*, C. Cls. No. 179–59.

easements would interfere with exploitation of the mineral estates was also put in issue. Expert witnesses testified concerning the value of the tracts both before and after the easements had been taken. L. A. Willcox, a witness offered by the landowners, testified at great length concerning a formula of his own devising whereby the injury caused by a clearance easement could be assessed, and he purported to compute the specific injury caused to each of the tracts. The commission also viewed the premises.

The commission filed its initial report on November 9, 1959 (R. 37). This report, appended to the government's brief as Appendix I (pp. 31–39, *infra*) merely recited the names of the commissioners, then listed each of the ten tracts involved (as described in the declaration of taking), and followed each description with a dollar figure representing "Damages Assessed."[3] The total awards came to $49,982. (Appendix III, p. 46, *infra*.)

The government objected to the adequacy of this report for judicial review. (R. 44). The matter having apparently been resubmitted informally to the commission by the district court, the commission filed an "Additional Report" on October 7, 1960 (R. 45–49). This report appears as Appendix II to the government's brief (pp. 40–44, *infra*). The supplemental report contained under the heading "Findings of

[3] The initial report also rejected certain claims pertaining to possible use of the land made by the owners of one of the fee interests which had been taken. Since the government did not appeal from the district court judgment on the fee interest, these findings are not relevant in the present posture of the case.

Fact": (1) the heights of the clearance easements; (2) the fact that one tract was taken in fee; (3) the names of the fee simple owners of all the tracts; (4) the tracts on which oil and gas leases were outstanding; (5) the fact that one party's partial one-quarter mineral share was, by stipulation, to be treated as a full one-quarter mineral share; and (6) the fact that the highest and best use of the land was for general agricultural purposes (R. 46–47).

Under the heading "Conclusions of Law," the supplemental report advised that: (1) the United States was entitled to take the property and the landowners were entitled to just compensation; (2) just compensation was to be determined by subtracting the value of the landowners' interest immediately after the taking from its value immediately before the taking; (3) the use to which the government would put the area taken by the clearance easements was not an issue in the case; and (4) certain evidence pertaining to the tract taken in fee simple was stricken, and the government's motion to strike the testimony of Willcox was overruled.

The government renewed its objections to the commission's reports on the grounds previously stated and on other similar grounds (R. 49–52). Thereafter, the District Judge informally advised the parties of his intention to adopt the commission's report (R. 53), and the report was officially adopted in a judgment dated January 13, 1961 (R. 57–69). The judgment set out no additional grounds of decision, but merely "adopted in all respects" the commission's

report "as the findings and judgment of this Court" (R. 54).

The government appealed.[4] Although the court of appeals acknowledged that the valuation evidence was conflicting and that only "a general finding as to this amount [the amount of compensation due] was made," it affirmed the judgments. Observing that the "extent of exactness which is required in findings depends upon the nature of the matter involved," it held that the "issues in this case are not complicated * * * and the findings are entirely adequate to permit us to review them and to conclude that they are not clearly erroneous" (R. 474–477).

The court of appeals recognized that there "was a sharp conflict in the evidence as to the amount of * * * damages." It upheld the *findings*, however, because it found the *awards* to be "well within the range of this conflicting testimony." It did not indicate what evidence it believed the commission or the district court had relied on. The government's petition for rehearing *en banc*, calling attention to decisions of the Fourth and Ninth Circuits rendered after argument of the present case, was denied without opinion.

SUMMARY OF ARGUMENT

A. An analysis of the commission's reports discloses that they fail to state how the commissioners

[4] Only eight clearance easements are involved in the present posture of the case. The government did not appeal from the judgment regarding the fee simple interest, and the government's motion to dismiss its appeal as to one tract on which only an undivided one-half mineral interest was involved was granted by the court of appeals on August 17, 1961.

resolved factual and legal issues which emerged during the hearing. Instead of supplying "findings * * * which are sufficient to indicate the factual basis for the ultimate conclusion," *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 422, the commission's reports contained only the awards assessed by the commission and general statements of stipulated facts and self-evident propositions of law.

B. Rule 71A(h) of the Federal Rules of Civil Procedure explicitly provides that a condemnation commission's "findings and report" shall be dealt with by the district court in accordance with the practice prescribed in Rule 53(e)(2), which, in turn, requires acceptance of the findings unless they are "clearly erroneous." The district court can meet its obligation to review the commission's findings meaningfully only if the commission's report states findings and articulates the grounds of the commission's decision.

C. In addition, the district court must determine whether the commissioners have correctly applied legal principles in considering the evidence and in determining the compensation which is due. This can be done only if the commission states the principles of law which it has applied, and how it has applied them.

D. Gaps in a commission's findings cannot be filled by the district court. They must be filled by the commission, which saw and heard the witnesses and is the sole judge of their credibility and of the weight to be given to their testimony. Nor may the court of appeals simply review the dead record and decide that it is satisfied with the commission's conclusions

when there is no way of knowing what evidence the commission considered or whether it correctly applied the pertinent principles of law. Inadequate commission reports cannot be allowed to destroy the essentials of the right to a judicial hearing.

ARGUMENT

THE REPORTS SHOULD HAVE BEEN RECOMMITTED TO THE COMMISSION BY THE DISTRICT COURT BECAUSE THEY FAILED TO ARTICULATE SUBSIDIARY FINDINGS AND LEGAL REASONING WITH SUFFICIENT PARTICULARITY TO PERMIT MEANINGFUL JUDICIAL REVIEW

A. THE INITIAL AND SUPPLEMENTARY REPORTS CONTAINED ONLY FINAL CONCLUSIONS AND DID NOT SET OUT THE FACTUAL BASIS FOR THESE CONCLUSIONS

The brief summary provided at pp. 5–6, *supra*, of the contents of the commission's two reports (which are reprinted in full as Appendices at pp. 31–44, *infra*) shows that the commissioners articulated no particular findings on any subsidiary issues of fact or law. The first report (insofar as it is relevant to the case in its present posture)[3] merely announced the dollar figures representing the commissioners' conclusions as to the value of each of the easements. The second report contained more precise statements regarding the height of the clearance easements (which had been stipulated), the names of the fee owners of the tracts (which were irrelevant to "the issue of just compensation"), the existence of certain mineral leases (which had not been disputed), and the "highest and best use of the land" (which had been stipulated). None of these supplemental "Findings of Fact" supplies any

[3] See note 3, p. 5, *supra*.

clue as to the basis upon which the commissioners reached their awards.

Nor were the "Conclusions of Law" set out in the second report helpful in divining the commissioners' reasons for deciding as they did. The first says only that there is a right to just compensation; the second simply states that the value of a condemned easement is measured by the diminution in the value of the servient estate; the third announces the obvious proposition that a clearance easement is not an avigation easement; and the fourth, insofar as it is relevant, merely keeps certain evidence in the record. In summary, the report which the commission submitted to the district court did nothing more than announce, as an *ipse dixit*, the commission's ultimate conclusions regarding the value of the condemned clearance easements.

Five days of testimony before the commission had produced 439 pages of transcript. There emerged from the hearing at least five subsidiary issues of fact, in addition to many questions of law, which the commissioners necessarily had to resolve before they could arrive at a reasoned estimate of the value of the condemned easements. The following are illustrative factual questions:

(1) *What was the market value of the land before the taking?*—The landowners' own testimony was that the value of the seven[*] tracts of land before the ease-

[*] Two of the clearance easements were taken over different portions of the same 60-acre tract. Hence while the case concerns eight easements, it involves only seven tracts.

ments were taken ranged from $18,000 to $40,000 (R. 73–118). Another witness who testified on behalf of the landowners assessed these tracts at values ranging from $13,000 to $60,200 (R. 125–132).[1] Based on 24 comparable sales, the government's witnesses testified that the land had values between $12,260 and $31,200 (R. 259–402). (See Appendix III, pp. 45–46, *infra*.) The commission properly concluded that the award should represent the difference between "the fair cash market value of the estate of the defendants at the time of the taking and fair cash market value of the estate of the defendants immediately after said taking." But it failed to demonstrate that it had even completed the initial step of discovering the minuend for this exercise in subtraction. It also failed to disclose whether it had considered the evidence of comparable sales presented by government witnesses.

(2) *What was the proportional depreciation in value attributable to the easements?*—All but one of the landowners testified flatly that the value of their land had been reduced by approximately 50 percent as a result of the takings (R. 73–124). One landowner testified that it was diminished by one-fifth of its earlier value (R. 114–115). The landowners' other witness, an appraiser named Willcox, proposed a formula of his own devising by which the value of

[1] Interestingly enough, the tract estimated by this witness at $60,200 was valued by its owner at only $25,000, whereas the tract estimated by the witness at $13,000 had been assessed at $40,000 by its owner. These substantial disparities merely illustrate the great range of differences which existed even among the respondents' witnesses.

a clearance easement could be computed (R. 179).[8] The government's witnesses based their assessments on the extent to which the easements would interfere with farming operations on the property or with the development of mineral deposits in the land (R. 259–402). The commission denied the government's motion to strike the testimony of Willcox. Consequently, it has given no indication whatever as to the method that it used to decide what percentage of a tract's total value was affected by the taking of the easements.

(3) *What was the value of the mineral estates?*—Most of the landowners did not value their surface and mineral estates separately. The son of one landowner testified, however, that the mineral estate on his mother's property was worth $50 an acre (R. 120). Willcox, the landowners' expert witness, based his computations on the premise that the full value of the mineral estates on each of the tracts was $75 per acre (R. 164). The government's expert witness on the subject of mineral values assessed the full title to all mineral interests on the land at either $30 or $35 per acre.[9] The commissioners' reports did not resolve this conflict.

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[8] This formula was never stated clearly, but it appears to be as follows:

$$\frac{\text{per acre value of land and buildings}}{200} \times (200 \textit{ minus } \text{average height of the easement}) \times \text{acres of land affected} = \text{award for surface damage}$$

[9] He testified that the difference in valuation was based upon whether the tract was on the north or south sides of the air force base. He found the south side more valuable because of its proximity to "higher priced leases" (R. 239).

(4) *What was the injury to the mineral interests caused by the easements?*—The landowners' expert witness testified that in most cases the mineral estate would be a total loss as a result of the clearance easements (R. 127). The government's expert witness testified that the extent of the loss would depend on the height of the permissible ceiling and other topographical factors (R. 240, 243). Accordingly, in some cases he concluded that the effect of the easement was to depreciate the value of the mineral interest to one-seventh or one-sixth of its unencumbered value, and in others he found that the mineral estate was unaffected or only slightly reduced (R. 240–241). The commission made no finding upon this issue.

(5) *What would be the practical effect of the easements on agricultural use of the land?*—The landowners generally admitted that the clearance easements would not interfere with their use of the land for agricultural purposes (R. 77–120). Their expert witness indicated that he believed that some crops could not be grown on certain farms as a result of the easements (R. 137), and that the use of the land for pasture might be restricted (R. 184). The commission made no finding on this issue.

In summary, what the hearing revealed was that the valuation hinged on the commission's preliminary resolution of many issues. Some of these issues are attributable to the type of easement which was taken, and others are ordinary recurring questions of valuation. In addition, issues of law were argued before the commission and had to be resolved (see pp. 24–26,

infra). Yet the commission did not make a single finding which would reveal the basis for its computations and for its ultimate dollar awards.

B. THE CONCLUSORY REPORTS FILED BY THE COMMISSION EFFECTIVELY PRECLUDED THE JUDICIAL REVIEW OF FINDINGS OF FACT PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 71A(h) authorizes a trial of "the issue of just compensation" in federal condemnation cases to be held before a commission of three persons appointed by the court. The rule further provides explicitly that the effect of the "findings and report" of such a commission is to be the same as that set out in Rule 53(e)(2). The latter provision, which pertains to the reports of masters in non-jury cases, states, "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.'" Accordingly, it is the duty of a district court which has submitted the issue of just compensation in a condemnation case to a commission, to assess each of the factual determinations underlying the commission's conclusion by the same standard which Rule 52(a) directs courts of appeals to apply in reviewing a district court's findings of fact in non-jury cases. The conclusory reports filed in the present case effectively foreclosed any such judicial review.

The principle that factfinders whose determinations are subject to judicial review must state their findings with sufficient specificity to permit intelligent assessment of their correctness is based on good sense and sound judicial administration. It is impossible for

an appellate tribunal to determine whether conclusions based upon resolutions of factual issues are valid unless it knows how the factual issues were determined in the first instance. And it is in no position to judge whether the underlying factual premises were supported by evidence in the record and were not "clearly erroneous" unless these premises have been articulated.

Rule 52(a) of the Federal Rules of Civil Procedure requires that a district court in a non-jury case "find the facts specially." This Court has construed that provision to mean that the district court must make findings, "in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion * * * can rationally be predicated." *Kelley* v. *Everglades Drainage District,* 319 U.S. 415, 420; see *Commissioner* v. *Duberstein,* 363 U.S. 278, 292; *Hatahley* v. *United States,* 351 U.S. 173, 182; *Dalehite* v. *United States,* 346 U.S. 15, 24, n. 8.

Rule 52(a) itself obviously does not apply to the report of a condemnation commission, but the same underlying policy of requiring triers of fact to state sufficiently detailed findings to provide the basis for efficient review of questions of law and fact governs proceedings under Rule 71A(h). The need is identical, as the present case demonstrates. See pp. 19–21, *infra.* And Rule 71A(h) contemplates that the commission will make "its findings and report." The plural "findings" and the conjunctive reference to "findings and report" make it plain that this requirement is not satisfied by a skeleton statement of

the conclusion reached. Rule 71A(h) requires of a commission, just as Rule 52(a) requires of a district court, that it submit more than an "unelaborated finding of ultimate fact." *Commissioner* v. *Duberstein*, 363 U.S. 278, 292. In each case the bare conclusion defeats the purpose of the rule because full findings are "of the highest importance to a proper review." *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 316.

Even if Rule 71A(h) were entirely silent on the subject, the proper administration of condemnation cases would require that commissions make findings of fact. For the principle that findings of fact upon which a tribunal's judgment rests must be articulated by that tribunal does not depend on the particular language of any Rule of Civil Procedure. In *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U.S. 67, 69, 71, a case which antedated the adoption of the Federal Rules, this Court reversed an interlocutory injunction and remanded the case to the three-judge district court "for findings and conclusions appropriate to a decision upon the application for an interlocutory injunction," notwithstanding its observation that no rule of procedure expressly required the district court to articulate the grounds for its decision. The holding was based on the court's view that "a statement of the grounds of decision, both as to facts and law" was necessary as an aid to litigants and to the reviewing court.

The same has been true of judicial review of administrative agencies. While the standard of review for administrative agencies' findings of fact is somewhat different from the "clearly erroneous" prin-

ciple covering review of district courts, this Court has consistently required agencies to set out the factual basis for their ultimate conclusions. Only last Term, in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167–168, it was noted that the Interstate Commerce Commission had articulated "no findings and no analysis * * * to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." The court concluded, "We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice."

Section 8(b) of the Administrative Procedure Act, relied upon by the Court in *Burlington Truck Lines*, reaffirms a rule which was established well before the Act became law. In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94, this Court observed that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." This conclusion was based on the Court's premise, which is fully applicable here, that "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." See also *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488–489; *Florida* v. *United States*, 282 U.S. 194, 215; *cf. Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 81. The perplexing problem with which a reviewing court is confronted when an agency or lower court has failed to state its grounds of decision was summed up by Mr. Justice Cardozo in *United States* v. *Chicago, Milwaukee, St. P. & Pac. R. Co.*,

294 U.S. 499, 510–511: "In the end we are left to spell out, to argue, to choose between conflicting inferences. * * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Rule 71A(h) of the Federal Rules of Civil Procedure does not expressly direct commissioners to "find the facts specially," as does Rule 52(a) with respect to district courts. Nor does Rule 71A(h) even make applicable to condemnation commissioners the subsection of Rule 53(e) which instructs masters to set forth findings of facts in their reports "if required to make" such findings.[10] But Rule 71A(h) does contemplate that the commission will file a report with the district court and that its findings of fact will be reviewed by the latter in accordance with the "clearly

[10] This expression appears in Rule 53(e)(1), which is not referred to in Rule 71A(h). The fact that Rule 53(e)(1) appears to make the submission of findings conditional on the master's being "required" to make such findings should not be taken as a negative implication that, in the absence of specific instructions a master's report is adequate if supporting facts and legal reasoning are omitted. Since Rule 53 provides that masters may be appointed for various purposes, some of which may not require any determination of issues of fact, the Rule had to be so phrased as to cover instances when no findings had to be made. An auditor, for example, might be appointed as a master to combine several books of account into a single manageable document. His report might then consist only of his finished product, and his task would not require him to make findings of fact or conclusions of law. It is the government's position, however, that when a master is appointed to determine ultimate issues of fact, and when his conclusion must be based upon the resolution of conflicting testimony and/or controverted questions of law, he *must* state the grounds of his decision in his report in order to render it judicially reviewable.

erroneous" standard of Rule 53(e)(2). If this review is to be meaningful at all, the district court must require the commission to specify the subsidiary facts it found and on which it relied in reasoning towards its ultimate findings.

The present case cogently illustrates the need for an elaboration of a commission's grounds of decision. As has been demonstrated above (pp. 10–14, *supra*), many issues of fact touching upon the valuation of the easements were presented to the commission. The form which the commission's report took made it utterly impossible for the district court to examine the commission's resolution of these factual issues and to determine whether or not any of them, or any inference the commission based upon them, was "clearly erroneous." The landowners, for example, generally maintained that the value of their property had been reduced by one-half as a result of the easements, regardless of the varying heights of the clearances. If the commissioners accepted this position it would have been clear error requiring rejection of their reports. But it is impossible to tell from the reports whether they did or not, since the reports do not even state the market value which the tracts had before or after the taking. Or, for example, the commissioners may have adopted the mistakes made by the landowners' expert witness, who assessed the injury to the mineral estates at their full value regardless of the varying heights of the easements, and who erroneously applied a rigid formula as the basis for his testimony. Indeed, error of the most basic and clearest sort may have been committed if the commission, applying the standard set out in its Second

Conclusion of Law, made an arithmetical mistake in subtracting the "after" figure from the "before." But even so fundamental a matter was concealed from further scrutiny by the conclusory form of the commission's findings.

In addition, proper judicial administration requires that commissions make findings of fact in order to insure that they have given full consideration to all the elements of a case. As the Court of Appeals for the Second Circuit said in *United States* v. *Forness*, 125 F. 2d 928, 942–943 (C.A. 2), certiorari denied *sub nom. City of Salamanca* v. *United States*, 316 U.S. 694:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. * * * To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be.

Those observations apply with special force to the proceedings of commissioners under Rule 71A(h). Since the rule sets out no qualifications for member-

ship on a commission, and does not even require that any member of the commission be a lawyer, it is most desirable that the commissioners be required to articulate their grounds of decision so as to focus their attention on the dispositive issues. In addition, a report should set out the evidence on which the commission relied, both as necessary self-discipline and to facilitate judicial review. Commissions often hear evidence sporadically over a period of time and may not make reports until long after the evidence is in. Consequently, reviewing the evidence and making specific findings are useful methods of recalling to the commissioners' minds the critical factual issues on which determination of just compensation hinges. And since no judge regulates the evidence which a commission is able to hear, the requirement that findings be made is necessary to insure that the commission relies only upon admissible evidence.

The need for specific subsidiary findings of fact in commission-tried condemnation cases has been recognized in decisions of the Second, Third, Fourth, Fifth and Ninth Circuits,[11] but these decisions do not an-

[11] *United States* v. *4400 Acres in the Town of Greece (Odenbach)*, 234 F. 2d 410, 411, 414 (concurring opinion 416), (C.A. 2), certiorari denied, 352 U.S. 916; *United States* v. *Bobinski*, 244 F. 2d 299, 301–302 (C.A. 2); *United States* v. *Certain Parcels of Land in Philadelphia (Merchants Exchange)*, 215 F. 2d 140, 142, 144–146 (C.A. 3); *United States* v. *Cunningham*, 246 F. 2d 330, 333 (C.A. 4); *United States* v. *Carroll*, 304 F. 2d 300, 304–306 (C.A. 4); *United States* v. *2,477.79 Acres in Bell County (Bowles)*, 259 F. 2d 23, 29 (C.A. 5); *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 406–409 (C.A. 5), certiorari denied, 366 U.S. 944; *United States* v. *2,872.88 Acres in Clay and Quitman Counties*, 310 F. 2d 775 (C.A. 5), certiorari

nounce either a uniform standard for the content of the reports or a uniform rule governing the functions of a reviewing court. In the present case, the court of appeals held that the commission's final conclusion was enough because the appellate court could review the transcript. *United States* v. *Lewis*, 308 F. 2d 453 (C.A. 9), held that a bare conclusion was insufficient and remanded two of the five cases considered in that opinion to the commission for complete reports. It further held as to the other three cases that reports which state how the commission arrived at its conclusions are adequate, even though they do not show what the evidence was. This rule imposed on the district court the burden of comparing the evidence with the reports, and the cases were remanded to the district court for that purpose. *United States* v. *2,872.88 Acres in Clay and Quitman Counties*, 310 F. 2d 775 (C.A. 5), certiorari granted, 372 U.S. 975, held that reports which summarized the evidence but did not show how the commission reached its conclusions were inadequate. Our position is that the report should show both what the evidence was and how the commission used it in reaching its conclusions. Then the reviewer, either the district court or the court of appeals, must look at the transcript only to the extent that the parties contend the report's statements are wrong. In the absence of objections to the factual accuracy of the report, the reviewing court will be able to judge from the face of the report

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granted, 372 U.S. 975; *United States* v. *Lewis*, 308 F. 2d 453, 455–456, 458–460 (C.A. 9); *Louis Gill and Sons* v. *United States*, 313 F. 2d 416 (C.A. 9).

whether the findings are supported by evidence and whether the commission has committed an error of law.

The court of appeals in this case attempted to distinguish the decisions in other circuits on the ground that the "issues in this case are not complicated" (R. 477). In comparison with many condemnation cases this was, indeed, a simple case, but it clearly illustrates the need for a full report in all cases referred to a commission. The appearance of facility with which the commission purported to resolve the issues results from its confining its "findings of fact" (except those concerning damages) to an irrelevancy such as the ownership of the fee or to matters on which the parties had stipulated. By ignoring the real controversies underlying the issue of just compensation, the commission was able to produce findings which were largely indisputable and assuredly immune from reversal on appeal.

The fact that juries in condemnation cases return general verdicts which state only dollar valuations is of no bearing on the present issue. *First,* juries are the final triers of fact. If there is evidence in the record warranting submission of a case to the jury, its findings of fact are non-reviewable. Findings by condemnation commissions, on the other hand, are to be reversed under Rules 71A(h) and 53(e)((2) if the district court is satisfied that they are clearly erroneous—*i.e.*, if it "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395. Hence the commission's findings, unlike those of a jury, must be in a form which permits in-

telligent review. *Second*, juries hear and consider only such evidence as is admitted by a district court, whose rulings on evidentiary questions are matters of record and may be appealed. *E.g., McCandless* v. *United States*, 298 U.S. 342, 345–348. *Finally*, the law applied by juries is also a matter of record insofar as it is reflected in the instructions of the trial judge. Faulty instructions are ground for reversal. But, as we develop *infra*, the law applied in commission-tried cases cannot be effectively reviewed if the report is conclusory only.

C. THE CONCLUSORY REPORTS FILED BY THE COMMISSION EFFECTIVELY PRECLUDED JUDICIAL REVIEW OF ISSUES OF LAW

In addition to the provisions of the Federal Rules which direct district courts to review a commission's findings of fact, the courts must also supervise the application of legal principles to the facts of the case. In this respect, the district court is not limited by the "clearly erroneous" standard of Rule 53(e)(2), but has the duty of considering each issue of law on its own merits. *E.g., Dalehite* v. *United States*, 346 U.S. 15, 24, n. 8. Since the reports of the commission concealed not only its subsidiary findings of fact but also the principles of law which it applied, it was error for the district court to accept the reports.

It is hardly necessary to observe that errors of law which the district court could not commit without suffering reversal cannot be committed with impunity by the commission which it appoints and whose order it enforces. A conclusory commission report may conceal just such errors. For example, if the commission used the mathematical formula devised by the landowners' expert witness for measuring

damages, the evidence of which it refused to strike (R. 126–127), that would have been an error of law, both because valuation is not a matter of formulas, *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402; *United States* v. *Cors*, 337 U.S. 325, 332, and because the particular formula was patently erroneous.[12] Or if the commission considered the managerial skill of the landowners in determining the value of the tracts, as was suggested by the landowners' expert witness (R. 170–171), that too was an error of law. Since managerial skill is non-transferable, it is not a proper element of value for federal condemnation purposes.

[12] The formula (see note 8, p. 12, *supra*) was arbitrarily based on the assumption that clearance is valuable up to 200 feet, and that each foot of clearance up to that height is equally valuable. Obviously, however, there is a substantial difference between being unable to use the space which is between 10 and 20 feet off the ground and that which is between 180 and 190 feet off the ground, although each involves only 10 feet in vertical measure. Moreover, the surface value of land is not composed solely of the sum of the value of all cubic inches of airspace above the land. The formula assumes, however, that land has only the value of the airspace above it.

It is no answer to say, as did the court of appeals (R. 478), that the commission properly stated the general measure of damages as an abstract principle or that the possible error of law in admitting Willcox' testimony "was not prejudicial to the United States." This approach would unfairly put upon the losing party the impossible burden of demonstrating, on the basis of a noncommittal report, that acknowledged error had been prejudicial in some specific way. Such a shift of the burden would be directly contrary to this Court's holding in *McCandless* v. *United States*, 298 U.S. 342, 347–348, "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (Emphasis in the original.) Here it can hardly be said that the record affirmatively shows that the commission ignored testimony which it explicitly refused to strike.

Kimball Laundy Co. v. *United States*, 338 U.S. 1, 5. Or if the commission capitalized assumed oil and gas bonuses and rentals as suggested by the landowners' expert witness (R. 163–164), that was an error of law. Since such bonuses and rentals were "not fairly shown to be reasonably probable," they should have been excluded as speculative. *Olson* v. *United States*, 292 U.S. 246, 257. Or if the commission construed the words "other materials" in the declaration of taking to prevent the use of certain farm machinery on the land (R. 181–183),[13] that too was an error of law.

Yet none of the commission's rulings on these questions appears in its reports. Instead, the reports' "Conclusions of Law" pertain to irrelevancies or to abstract propositions which are indisputable. Their effect is to prevent any judicial examination of whether proper legal principles were applied to the facts of the case.

D. THE GAPS IN A COMMISSION'S FINDINGS CANNOT BE FILLED BY THE DISTRICT COURT

In the present case the district court did not attempt to supply the findings omitted by the commissioners, so that a final decision was rendered without any findings of fact—a plain violation of the principles of judicial administration and of the policy underlying Rule 52(a), even though the rule itself may

[13] The commission heard argument on this point and stated during the hearing that it would "have to make a construction of this, and we have to show in our report how we construed this" (R. 183). No indication as to how the words were construed appears in the reports.

not be applicable when a case is referred to a commission under Rule 71A(h). In fact, it was then too late to remedy the defect except by remand to the commission pursuant to Rule 71A(h) and Rule 53(e)(2). Gaps in commissioners' findings, except those involving pure formalities, cannot be filled by the district court.[14] This is a further reason for requiring full and complete findings in a commission's "findings and report."

[14] Certain decisions in the Fourth and Fifth Circuits appear to imply that a district court is free, if it rejects a commission's findings of fact as "clearly erroneous," to enter findings of its own on conflicting testimony, and that these findings may be reversed by a court of appeals only if the district court is "clearly erroneous." See, *e.g.*, *United States* v. *Twin City Power Co.*, 248 F. 2d 108, 112 (C.A. 4), certiorari denied, 356 U.S. 918; *United States* v. *Twin City Power Co. of Georgia*, 253 F. 2d 197, 201–203 (C.A. 5); *United States* v. *Certain Interests in Cumberland County*, 296 F. 2d 264, 268–269 (C.A. 4). But see *United States* v. *Carroll*, 304 F. 2d 300, 302–307 (C.A. 4). And see *United States* v. *Tampa Bay Garden Apts., Inc.*, 294 F. 2d 598 (C.A. 5), where a district court was permitted to supplement findings on the basis of the evidence before the commission without rejecting the commission's findings. It is the government's position that these decisions are incorrect both insofar as they sanction independent examinations and analyses of the dead record by district courts and clothe the factual conclusions reached by courts after such examinations with the presumption of correctness created by the "clearly erroneous" standard. The proper issue before both the district court and the court of appeals in such cases is whether the *commission's* findings, based upon personal observation of the witnesses, were "clearly erroneous." *United States* v. *Certain Parcels of Land in Philadelphia*, 215 F. 2d 140, 146 (C.A. 3); see *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 689; *United States* v. *Twin City Power Co. of Georgia*, 253 F. 2d 197, 205 (C.A. 5) (Tuttle, J., dissenting), and authorities there cited.

The proposition that a district court may not make findings of fact omitted by or different from those of the commissioners rests upon the familiar principle that the "one who decides must hear," *Morgan* v. *United States*, 298 U.S. 468, 481. Resolution of the factual issues in a condemnation case, especially of the questions of value, depends upon the personal appearance of the witnesses under cross-examination and other intangible indicia of reliability that are available only to those who see and hear the witnesses themselves. Normally, as in the instant case, there is a wide range of valuations, each with support in expert testimony, and the outcome depends upon the impression left by individual witnesses, their demeanor, their candor, and their straightforwardness and persuasiveness under cross-examination. *United States* v. *Glanat Realty Corp.*, 276 F. 2d 264, 267 (C.A. 2); *H. & H. Supply Co.* v. *United Sattes*, 194 F. 2d 553, 556 (C.A. 10); *United States* v. *Delano Park Homes*, 146 F. 2d 473, 475 (C.A. 2). The same considerations that preclude an appellate court from making new findings where a wrong approach to valuation was followed by the trier of facts prevent a judge from making findings upon contested issues before a commission.

> Although the evidence does appear of record, we think it inappropriate for us to make the ultimate conclusion upon which decision must rest. There well may be further evidence which in fairness the parties should be allowed to present, since the case went off below on a different theory of valuation. Moreover, since

> the conclusion must be one reached not mechanically, but through the exercise of judgment on the evidence, it should be formulated in the first instance by the trial judge, subject to the usual appellate review. He must of course bear in mind that the burden of proving the fact of loss, and, if any exists, then its amount, rests upon the condemnees. * * * [*United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 398 (C.A. 2).]

A fortiori it was error for the court of appeals simply to review the record and conclude that it was satisfied with the conclusions that the commissioners reached. Commissioners are not a jury. They operate quite differently, often hearing the case at intervals over a protracted period and delaying a report. The procedure is informal, lacking safeguards of due process. While commissions are often given admirable general guidance in advance, they receive no rulings from the judge upon the evidence and no instructions upon questions of law that develop, upon the particular facts during the hearings. A jury is given such guidance and instructions, which the jury is presumed to follow, so that it may apply them to the facts and reach the ultimate result. When there is a reference to commissions the sequence is usually reversed. The commission is to provide the "findings and report," to which the court will then apply the correct rules of law and reach the ultimate conclusion. This difference prevents treating the commission's ultimate conclusions like the verdict of a jury. In treating the case in that fashion the court of appeals erred.

The issue in this case—which concerns the procedure under Rule 71A(h), a rule with which this Court has not previously dealt—although in one sense narrow and procedural, in truth affects the fundamental fairness of condemnation proceedings in which there is a reference to commissioners. When there is a jury, either party is entitled to a judicial proceeding with all the safeguards directed to proper limitations upon the admission and consideration of evidence, full hearing and cross-examination and adherence to the applicable rules of law. Rule 71A(h) provides a useful alternative in certain cases, but it cannot operate fairly unless it preserves the essentials of the right to a judicial hearing. The best assurance that the commissioners will make a reasoned determination upon evidence is to require a report with full findings addressed to the issues. Such a report is also the only means of determining whether the findings are supported by evidence and consistent with the applicable law.

CONCLUSION

Too long a period has now elapsed for the old commission to make adequate findings and report upon the previous hearings. The judgment of the court of appeals should be reversed and the case remanded to the district court for a new trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

SEPTEMBER 1963.

APPENDIX I

In the United States District Court for the Western District of Oklahoma

REPORT OF COMMISSION—FILED NOVEMBER 9, 1959

Comes Now the undersigned, Stansell E. Whiteside, Finis C. Gillespie and Jerry Tisdal, a commission appointed by this court, and do now respectfully report:

That pursuant to an order of this court made and entered on the 6th day of August, 1959, the above entitled cause was referred to the undersigned, as a commission; that pursuant to said order and the directions contained therein, said commission did notify all interested parties that a hearing would be held on the 8th day of September, 1959, at Clinton, Oklahoma; that said hearing was attended by Paul G. Cress, United States Attorney and George Camp, as attorneys for the condemnor; that the defendants were represented by their attorneys, Meacham, Meacham & Meacham, insofar as the following tracts of land were concerned:

Tract A-104E	Value of the Clearance Easement.
Tract A-106E	Do.
Tract A-107E	Do.
Tract A-118E	Do.
Tract A-119E	Do.
Tract A-122E	Do.
Tract A-123E	Do.
Tract A-124E	Do.
Tract A-142E	Do.
Tract A-142	Value of the Fee.

Whereupon, the parties having announced ready for trial, the matter proceeded to trial, and various witnesses who were duly sworn, were called to testify, and the commission having personally viewed the lands in question and having heard the testimony and evidence presented by the parties, hereby evidences *it* decision and makes its report thereon to this court as follows:

FIRST

We, the undersigned commission, assess and fix the damage and the fair cash market value of the interest of the estate in the following described real property, as appropriated by the United States of America on March 8, 1956, for the uses and purposes defined in the Declaration of Taking filed herein, to-wit:

Tract No. A-104E

Indian Meridian T. 10 N., R. 19 West, Section 3, A tract of land in the Southwest Quarter more particularly described as Beginning at a point on the South line of said Southwest Quarter, said point being 250.0 feet East of the Southwest corner of said Southwest Quarter; thence north and parallel with the West line of said Southwest Quarter 1940.0 feet to a point; thence Northwesterly on a straight line to a point on the North line of said Southwest Quarter, said point being 162.5 feet East of the Northwest corner of said Southwest Quarter; thence East along said North line 2375.0 feet to a point, said point being 102.5 feet West of the Northeast corner of said Southwest Quarter; thence Southwesterly on a straight line to a point 700.0 feet South and 190.0 feet West of the Northeast corner of said Southwest Quarter; thence South and parallel to the East line of said Southwest Quarter 1940.0 feet to the South line of said South-

west Quarter; thence West along said South line 2200.00 feet to the point of beginning.

The area described aggregates 134.70 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed---------- $16,718.00

Tract No. A–106E

Indian Meridian T. 10 N., R. 19 W., Section 3, A tract of land in Lot 2, Lot 3 and Southeast Quarter of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter more particularly described as: Beginning at the Northwest corner of said Lot 3; thence East along the North line of said Lot 3 and said Lot 2 a distance of 1547.5 feet to a point, said point being 227.5 feet East of the North Quarter corner of said Section 3; thence Southwesterly on a straight line 2660.55 feet, more or less, to a point on the East-West quarter line of said Section 3, said point being 102.5 feet West of the center of said Section 3; thence West along said East-West quarter line 1217.5 feet to the Southwest corner of said Southeast Quarter of the Northwest Quarter; thence North along the West line of said Southeast Quarter of the Northwest Quarter, and the West line of said Lot 3, a distance of 2640 feet, more or less, to the point of beginning.

The area described aggregates 83.70 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed---------- $5,261.00

Tract No. A–107E

Indian Meridian T. 10 N., R. 19 West, Sections 3 and 4 A tract of land being part of Lot 4 and part of the Southwest Quarter of the Northwest Quarter of Section 3, and part of Lot 1 and part of the South-

east Quarter of the Northeast Quarter of Section 4 and more particularly described as: Beginning at the Northeast corner of said Lot 4, Section 3; thence South along the East line of said Lot 4 and the East line of said Southwest Quarter of the Northwest Quarter 2640.0 feet, more or less, to the Southeast Corner of said Southwest Quarter of the Northwest Quarter; thence West along the South line of said Southwest Quarter of the Northwest Quarter 1457.5 feet to a point; thence Northwesterly on a straight line 2660.55 feet, more or less, to a point on the North line of said Lot 1, Section 4, said point being 167.5 feet West of the Northeast corner of said Section 4; thence East along said North line and the North line of said Section 3, a distance of 1487.5 feet to the point of beginning.

The area described aggregates 80.10 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed---------- $5,333.00

Tract No. A–118E

Indian Meridian T. 10 N., R. 19 West, Section 27. A tract of land in the Northwest Quarter of the Northwest Quarter and the North Half of the Southwest Quarter of the Northwest Quarter more particularly described as: Beginning at the Northeast corner of the Northwest Quarter of the Northwest Quarter: thence South along the East line of said Northwest Quarter of the Northwest Quarter and the North Half of the Southwest Quarter of the Northwest Quarter 1980.0 feet to the Southeast corner of said North Half of the Southwest Quarter of the Northwest Quarter; thence west along the south line of said North Half of the Southwest Quarter of the Northwest Quarter 1202.5 feet to a point; thence northeast-

erly on a straight line 1068.25 feet to a point, said point being 400.0 feet North and 250.0 feet East of the Southwest corner of the Northwest Quarter of the Northwest Quarter; thence North 920.0 feet to a point on the North line of said Northwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of the Northwest Quarter, said point being 250.0 feet East of the Northwest corner thereof; thence East along said North line 1070.0 feet to the point of beginning.

The area described aggregates 50.25 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed..... $4,900.00

Tract No. A-119E

Indian Meridian T. 10 N., R. 19 W., Section 27 Northeast Quarter of the Southwest Quarter, Southwest Quarter of the Southwest Quarter, and all that part of the Northwest Quarter of the Southwest Quarter and the South Half of the Southwest Quarter of the Northwest Quarter more particularly described as: Beginning at the Northeast corner of said South Half of the Southwest Quarter of the Northwest Quarter; thence South along the East line of said South Half of the Southwest Quarter of the Northwest Quarter and the East line of said Northwest Quarter of the Southwest Quarter 1980 feet to the Southeast corner of said Northwest Quarter of the Southwest Quarter; thence West along the South line of said Northwest Quarter of the Southwest Quarter 1320 feet to the Southwest corner thereof; thence North along the West line of said Northwest Quarter of the Southwest Quarter 1040 feet to a point, said point being 280 feet South of the Northwest corner thereof; thence Northeasterly on a straight line 947.32

feet to a point on the North line of said South Half of the Southwest Quarter of the Northwest Quarter, said point being 117.5 feet East of the Northwest corner thereof; thence East along said North line 1202.5 feet to the point of beginning.

The area described aggregates 138.73 acres more or less, situate in Washita County, Oklahoma.

Damages Assessed $8,500.00

Tract No. A-122E

Indian Meridian T 10 N., R. 19 W., Section 27 A tract of land in the West Half of the West Half of the Southeast Quarter more particularly described as: Beginning at the South quarter corner of said Section 27; thence North along the North-South quarter line of said Section 27 2640 feet to the center of said Section 27; thence East along the East-West quarter line 25 feet to a point; thence Southeasterly on a straight line 2660.55 feet to a point on the South line of said Section 27, said point being 355 feet East of the south quarter corner thereof; thence West along said South line 355 feet to the point of beginning.

The area described aggregates 11.52 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed $2,387.00

Tract No. A-123E

Indian Meridian T. 10 N., R. 19 West, Section 28 A tract of land in the East Half of the East Half of the Southeast Quarter more particularly described as: Beginning at the Southeast corner of said Section 28; thence West 295 feet along the South line of said Section 28 to a point; thence Northeasterly on a straight line 2378.37 feet to a point on the East line of said Section 28, said point being 280 feet South of the East

Quarter corner thereof; thence South along said East line 2360 feet to the point of beginning.

The area described aggregates 7.99 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed $100.00

Tract No. A–124E

Indian Meridian T. 10 N., R. 19 W., Section 27 The Southeast Quarter of the Southwest Quarter

The area described aggregates 40 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed $4,100.00

SECOND

We, the undersigned commission, assess and fix the damage and the fair cash market value of the interest and estate in the following described real property, as appropriated on March 4, 1957 for the uses and purposes defined in the Amended Complaint and Declaration of Taking filed herein, to-wit:

Tract No. A–142E

Indian Meridian T. 10 N., R. 19 W., Section 27 North Half of the Southwest Quarter of the Northwest Quarter and that part of the Northwest Quarter of the Northwest Quarter described as follows: Beginning at the southwest corner thereof; thence north along the west line of said Northwest Quarter of the Northwest Quarter 1100.0 feet to a point; thence east and parallel to the north line of said Northwest Quarter of the Northwest Quarter 175.0 feet to a point; then North and parallel to said west line 220.0 feet to a point on the north line of said Northwest Quarter of the Northwest Quarter; thence east along said north line 280.0 feet to a point; thence

south and parallel to said west line 780.0 feet to a point; thence east and parallel to said north line 865.0 feet, more or less, to a point on the east line of said Northwest Quarter of the Northwest Quarter; thence south along said east line 540.0 feet to the southeast corner of said Northwest Quarter of the Northwest Quarter; thence west along the south line thereof to the point of beginning.

The area described aggregates 43.63 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ---------- $2,783.00

Tract No. A–142

Indian Meridian T. 10 N., R. 19 West, Section 27 A tract of land in the Northwest Quarter of the Northwest Quarter, more particularly described as: Beginning at the northeast corner of said Northwest Quarter of the Northwest Quarter; thence south along the east line of said Northwest Quarter of the Northwest Quarter 780.0 feet to a point; thence west and parallel to the north line of said Northwest Quarter of the Northwest Quarter 865.0 feet to a point; thence north and parallel to the West line of said Northwest Quarter of the Northwest Quarter 780.0 feet to a point on the north line of said Northwest Quarter of the Northwest Quarter; thence East along said north line 865.0 feet to the point of beginning,

Aggregating 15.49 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ---------- $2,000.00

The commission finds that the defendant owners of Tract A–142 failed to make any adequate proof that any portion of said lands had any value except for agricultural purposes as of March 4, 1957 other than for uses caused solely by the acts of the condemnor

in constructing an air base installation; that the evidence presented by said owners concerning value of said land for a sand pit and the consequent sale of such sand for uses other than those brought about by the acts of the condemnor was so speculative and conjectural that this commission could not properly determine any increased valuation of said property because of the presence of sand or other building materials upon said property.

Wherefore, we, the undersigned commission, do find that the above amounts as set forth by each individual tract is just compensation to be awarded the owners of said real estate by reason of the appropriation by the United States of America, and we recommend in this, our report, that this court enter a judgment and decree in favor of the defendant land owners in the amounts hereinbefore set forth; that the United States of America be decreed to pay the costs of this proceeding, including fees and charges of this commission.

Respectfully submitted this 23rd day of October, 1959.

STANSELL E. WHITESIDE
FINIS C. GILLESPIE
JERRY TISDAL

APPENDIX II

In the United States District Court for the Western District of Oklahoma

ADDITIONAL REPORT OF COMMISSION—FILED OCTOBER 7, 1960

Comes now the undersigned, Stansell E. Whiteside, Finis Gillespie and Jerry *Tisdale,* commissioners appointed by this court in the above entitled cause and herewith supplement and add to the report of commissioners heretofore filed herein on November 9, 1959, as follows:

Said report of commissioners heretofore filed is hereby referred to and made a part hereof as if fully set forth herein.

FINDINGS OF FACT

This commission makes the following specific findings of fact.

1. Plaintiff has taken a clearance easement over and across each of the tracts hereinafter set forth as set forth in the Complaint herein, with heights stipulated to be as follows:

Tract A–104E: 13 feet on the south line, 50 feet in the center, and 70 feet on the north line;

Tract A–106E: 71 feet on the south line to 163 feet on the north line;

Tract A–107E: 69 feet on the south line to 164 feet on the north line;

Tract 118E: 32 feet on the north line to 85 feet on the south line;

Tract 119E: 81 feet on the north line to 145 feet on the south line;

Tract 122E: 105 feet on the north line to 145 feet on the south line;

Tract 123E; 125 feet on the north line to 145 feet on the south line;

Tract 124E: 109 feet on the north line to 150 feet on the south line;

which tracts are described as set forth in the report of commissioners herein, which taking was on March 8, 1956, which heights are approximate and which heights would vary according to the conture of the lands;

2. Plaintiff has taken a clearance easement over and across Tract A–142 as set forth in the amended complaint, with heights stipulated to be 17 feet on the north side to 42 feet on the south side, which tract is described in the report of commissioners herein, which taking was on March 4, 1957, which heights are approximate and which heights vary according to the conture of the lands;

3. Plaintiff has taken Tract A–142 in fee, as set forth in the amended complaint, which tract was taken on March 4, 1957, and which tract is described as set forth in the report of the commissioners herein.

4. Said tracts are owned in fee simple as hereinafter set forth:

Tract No. A–104E: Leo Merz and Lewis Merz;
Tract No. A–106E: W. E. Guthrie;
Tract No. A–107E: John Kerkoff;
Tract No. A–118E;
Tract No. A–142E; and
Tract No. A–142: Robert Davis;
Tract No. A–119E: E. E. Smith;
Tract No. A–122E: Bertha Rogers, Juanita Nagel and Wanda Riggins;
Tract No. A–123E: No evidence as to fee ownership;

Tract No. A–124E: Ella B. Hoover;

5. The only interest involved in this hearing as to Tract A–123 is an undivided one-half of the oil, gas and other minerals in and under said real estate;

6. There was an oil and gas lease on each of Tracts A–106E, A–107E, A–118E, A–122E, A–123E, A–142E, and A–142 at the time each of said tracts was taken.

7. Minard Henderson owned an undivided one-fourth of the oil, gas and other minerals in and under Tract A–104E at the time of taking but was not entitled to participate in leasing, bonus, or delay rentals; however, it was stipulated and agreed between plaintiff and the defendants, Leo Merz, Lewis Merz and Minard Henderson, that no distinction would be made between said non-participating mineral interest as owned by Minard Henderson because of such non-participation, and that said mineral interest would be treated as a full one-fourth interest in the minerals by this Commission.

8. That the highest and best use of the land involved and as set forth in the said report of commissioners filed herein is for general agricultural purposes.

CONCLUSIONS OF LAW

Our conclusions as to the law applicable are as follows:

First

The right of plaintiff to take the property involved is not disputed and the owner in each instance is entitled to just compensation for the taking of his or her property.

Second

The amount of just compensation for each land owner involved is the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value

of the estate of the defendants immediately after said taking, being the *demunition* of said fair cash market value caused solely and directly by the taking;

Third

Any use of said area included in the clearance easements taken, such as by airplanes or otherwise, is in no way involved in this litigation and is not an item of damage herein;

Fourth

The motion of the government to strike the evidence of L. A. Wilcox was overruled and the motion of the government to strike the evidence of Robert Davis as to the sales of materials from Tract A–142 was sustained;

JUDGMENT

The amount assessed as damages in the report of commissioners herein in each instance was the amount of just compensation for the land owners represented at said hearing and as set forth in paragraph three of the findings of fact herein. The amount assessed as damages in the report of commissioners included all of the mineral rights of each land owner, whether leased or unleased, except as to Tract A–104E and Tract A–123E. As to Tract A–104E the amount set forth in the said report of commissioners is the amount of just compensation to Leo Merz, Lewis Merz and Minard Henderson, and the said Iminard Henderson's mineral interest is and damages are hereby declared to have been based on a mineral value of $30.00 per acre and the said Iminard Henderson damaged therefor in the total amount of $1,010.25, which damages should be and are hereby deducted from the assessment heretofore made on said Tract A–104E in the amount of $16,718.00. As to Tract A–123E, the

amount set forth in report of commissioners is the amount of just compensation to answering defendants owning an undivided one-half interest in and to the oil, gas and other minerals in and under said tract.

Respectfully submitted this 26th day of September, 1960.

STANSELL E. WHITESIDE
FINIS C. GILLESPIE
JERRY TISDAL

Compensation Claim

Stansell Whiteside	1½ days at $50.00	$75.00
"	Telephone Expense	1.75
"	Mileage-Altus to Hobart	7.00
"	" Altus to Okla City	30.00
Stansell Whiteside (Total)		$113.75*
Finis C. Gillespie	½ day at $50.00	25.00*
Jerry Tisdal	½ day at $50.00	25.00
"	Mileage-Cordell to Hobart	6.00
Jerry Tisdal (Total)		$31.00*

APPENDIX III

SUMMARY OF PERTINENT STATISTICS

Landowners' Valuation Testimony

Tract No.	Number of acres	Easement elevation	Before value	After value	Damages
A-104E	134.70	13'-70'	$40,000.00	$20,000.00	$20,000.00
A-106E	83.70	71'-163'	25,000.00	12,500.00	12,500.00
A-107E	80.10	69'-164'	25,000.00	12,500.00	12,500.00
A-119E	138.73	81'-145'	30,000.00	15,000.00	15,000.00
A-122E	11.52	105'-145'	40,000.00	32,000.00	8,000.00
A-124E	40.00	109'-150'	40,000.00	20,000.00	20,000.00
A-118E	50.25	32'-85'	18,000.00	9,000.00	9,000.00
A-142E	43.63	17'-42'	(1)	(1)	(1)
Total	582.63		218,000.00	121,000.00	97,000.00

Landowners' Appraiser Willcox

Tract No.	Before value	After value	Damages
A-104E	$52,000.00	$14,789.12	$37,210.88
A-106E	60,200.00	40,899.99	19,300.01
A-107E	35,950.00	23,182.80	12,767.20
A-119E	45,500.00	19,352.33	26,147.67
A-122E	55,000.00	53,704.40	1,295.60
A-124E	13,000.00	6,224.80	6,775.20
A-118E	16,361.25	1,930.63	14,430.62
A-142E	(2)	(2)	(2)
Total	278,011.25	160,084.07	117,927.18

Government Appraiser Davis

Tract No.	Before value	After value	Damages
A-104E	$22,800.00	$14,550.00	$8,250.00
A-106E	22,400.00	21,700.00	700.00
A-107E	23,000.00	22,300.00	700.00
A-119E	28,400.00	23,800.00	4,600.00
A-122E	29,600.00	29,300.00	300.00
A-124E	31,200.00	29,600.00	1,600.00
A-118E	8,050.00	6,950.00	1,100.00
A-142E	5,410.00	4,310.00	1,100.00
Total	170,860.00	152,510.00	18,350.00

[1] Tracts A-142E and A-118E are part of the same 60-acre tract.
[2] See note 1, *supra*.

Government Appraiser Houck

Tract No.	Before value	After value	Damages
A-104E	$25,050.00	$17,450.00	[3] $7,650.00
A-106E	24,400.00	23,700.00	700.00
A-107E	24,000.00	23,300.00	700.00
A-119E	25,400.00	21,000.00	4,400.00
A-122E	28,300.00	28,100.00	200.00
A-124E	29,600.00	28,200.00	1,400.00
A-118E	7,250.00	6,150.00	1,100.00
A-142E	5,010.00	4,210.00	800.00
Total	169,010.00	152,110.00	16,950.00

Summary of Damages Testimony and Award

Tract No.	Landowner	Wilcox	Davis	Houck	Award
A-104E	$20,000.00	$37,210.88	$8,250.00	$7,650.00	$16,718.00
A-106E	12,500.00	19,300.01	700.00	700.00	5,261.00
A-107E	12,500.00	12,767.20	700.00	700.00	5,333.00
A-119E	15,000.00	26,147.67	4,600.00	4,400.00	8,500.00
A-122E	8,000.00	1,295.60	300.00	200.00	2,387.00
A-124E	20,000.00	6,775.20	1,600.00	1,400.00	4,100.00
A-118E	9,000.00	14,430.62	1,100.00	1,100.00	4,900.00
A-142E	[4]	[4]	1,100.00	800.00	2,783.00
Total	97,000.00	117,927.18	18,350.00	16,950.00	49,982.00

[3] $50 was allowed for removal of trees.
[4] See note 1, supra.

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